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ARTICLES

BFOQ: AN EXCEPTION BECOMING THE RULE

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ON DECEMBER 15, 1967, PRESIDENT JOHNSON signed into law the Age Discrimination in Employment Act (ADEA).[1] The purpose of the Act, as defined in the preamble, is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers to find ways in meeting problems arising from the impact of age on employment."[2] The ADEA prohibits employers, employment agencies, and labor organizations from engaging in age-based discriminatory practices against individuals within the Act's protected age group, forty to sixty-five.[3]

There are three statutory exemptions to the Act's prohibition. The most noteworthy is section 4(f)1 of the ADEA, which states in pertinent part that, "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."[4]

Recent court decisions interpreting section 4(f)1 of the Act and defining BFOQ exemptions have done little to promote employment of or prohibit discrimination against older Americans. Nor have the decisions helped employers or workers understand applicable BFOQ standards. In essence, recent court decisions have so distorted the BFOQ exemption as to gut the lofty intent of the law set forth in the preamble.

The Seventh Circuit, in *Hodgson v. Greyhound Lines, Inc.*,[5] held that the defendant's refusal to hire any bus drivers over the age of forty involved a bona fide occupational qualification, and was therefore exempt under the Act. The Fifth Circuit, in *Usery v. Tamiami Trail Tours, Inc.*,[6] reached the same decision in an almost identical fact situation. Conversely, in *Houghton v. McDonnell-Douglas Corp.*[7] the Eighth Circuit did not follow the *Greyhound* and *Tamiami* decisions and held, in

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[1] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 (1970)).

[2] 29 U.S.C. § 621 (1970).

[3] 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975). It should be noted that the Act was made a part of the much more inclusive Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1970), which was originally enacted in 1938.

[4] 29 U.S.C. § 623(f)(1)(1970).

[5] 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

[6] 531 F.2d 224 (5th Cir. 1976).

[7] 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3351 (1977).

effect, that the removal of a test pilot from flight status simply because he had reached the age of fifty-two did not qualify as a BFOQ defense.

It is the purpose of this article to examine these recent court decisions, to assess the court's misapplication of their own historic BFOQ test, and to attempt to probe the source of this judicial failure.

I. The Department of Labor's View

In its interpretive bulletin, the Department of Labor stated that the determination of a bona fide occupational qualification would be based on "all the pertinent facts surrounding each particular situation."[8] The Department added that: "It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof in establishing that it applies is the responsibility of the employer. . . ."[9]

As an example of such a BFOQ, the bulletin offered federal statutory or regulatory age limitations imposed "for the safety and convenience of the public,"[10] as where the Federal Aviation Administration refuses to allow pilots over the age of sixty to engage in carrier operations. This narrow interpretation closely followed court decisions involving previous Fair Labor Standards Act exceptions.[11] In addition, the Department was not unmindful that the "administrative interpretation of the act by the enforcing agency is entitled to great deference."[12]

Many commentators felt that because the language of the Act's BFOQ provision was almost identical to that of Title VII of the 1964 Civil Rights Act, it would be accorded similar treatment by the courts.[13] The initial court decisions interpreting the ADEA seemed to bear this out.[14]

II. Greyhound and Tamiami: Different BFOQ Distortions, Same Result

On October 29, 1969, the Secretary of Labor filed suit in federal district court against Greyhound Lines, Inc., seeking to enjoin the company from enforcing its policy of not hiring individuals between the ages of

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[8] 29 C.F.R. § 860.102(b) (1976).

[9] *Id.*

[10] 29 C.F.R. § 860.102(d) (1976).

[11] "It is well settled that exemptions for the Fair Labor Standards Act are to be narrowly construed." Mitchell v. Kentucky Fin. Co., 359 U.S. 290, 295 (1959). *See* Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Idaho Metal Works v. Wirtz, 383 U.S. 190, 206 (1966) (citing Arnold v. Ben Kanowski, Inc.).

[12] Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971). *See* Udall v. Tallman, 380 U.S. 1, 4 (1965).

[13] *See* Freed & Dowell, *The Age Discrimination in Employment Act of 1967*, 6 Clearinghouse Rev. 196 (1972); Note, *Protecting the Older Worker*, 6 U. Mich. J. L. Ref. 214; Note, *Proving Discrimination Under the Age Discrimination in Employment Act*, 17 Ariz. L. Rev. 495 (1975).

[14] *See* Goger v. H. K. Porter Co., 492 F.2d 13 (3rd Cir. 1974); Schulz v. Hickock Mfg. Co., 358 F. Supp. 1208 (N.D. Ga. 1973).

forty and sixty-five.[15] The defendant company claimed that its policy fell within the BFOQ exception to the Act.[16] As a public carrier, the company argued, it was responsible for the safety of its passengers.[17] The duties of an intercity bus driver are arduous, especially for "extra-board" drivers — those who have no scheduled run but perform on the basis of passenger demand, and who handle special operations such as extra buses on regular runs.[18] Union agreements required that all new drivers work extra-board until they had sufficient seniority to bid for a regularly scheduled run.[19] Further, the aging process results in degenerative changes which have impact upon a driver's ability to perform; such effects as increased difficulty in night driving due to changes in visual sensory capacity, and increased likelihood of heart attacks,[20] are not easily detectable upon physical examination.[21] It was argued that the only factor which compensates for this degeneration is experience.[22] Newly-hired drivers have no such compensating experience, however, and yet must work the most difficult job of extra-board.[23] Hence, the company reasoned, it would be extremely dangerous to hire older individuals as new intercity bus drivers, a practice which would violate the company's duty as a public carrier as well.

The trial court, in examining the evidence, looked to see "whether or not Greyhound ha[d] established a 'factual basis' for its belief that applicants between the ages of 40 and 65 would be unable to perform safely the duties of an extra-board driver."[24] It found to the contrary that Greyhound's policy was not based on any statistical evidence, personal experience, or observations.[25] Having found for the department, the trial court permanently enjoined the company from continuing its discriminatory hiring policy.[26]

On appeal, the Seventh Circuit Court of Appeals reversed.[27] The circuit court found that Greyhound's claim raised "compelling concerns

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[15] Hogdson v. Greyhound Lines, Inc., 354 F. Supp. 230 (N.D. Ill. 1973), *rev'd*, 499 F.2d 859 (7th Cir. 1974). In fact, the company's hiring policy precluded acceptance of anyone over the age of 35, but due to the requirements of the ADEA only that portion of the policy which affected the protected age group was contested. *Id.* at 231.

[16] *Id.* at 232.

[17] *Id.* at 231.

[18] *Id.* at 235.

[19] *Id.* at 231.

[20] *Id.* at 233.

[21] *Id.* at 231.

[22] *Id.* at 236.

[23] Only that previous experience gained in employment with the company was considered. No other previous work experience, even with another bus company, was counted. *Id.* at 237.

[24] *Id.* at 236. The standard of proof was adopted by the court from Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). *See* note 40 *infra* and accompanying text.

[25] Hogdson v. Greyhound Lines, Inc., 354 F. Supp. 230, 236, 238 (N.D. Ill. 1973).

[26] *Id.* at 239.

[27] Hogdson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975).

for safety"[28] which entitled the company to meet a lesser burden of proof. It rejected the standard adopted by the district court and instead looked to a Tenth Circuit decision, *Spurlock v. United Airlines, Inc.*,[29] which involved the validity of pre-employment job qualifications for the position of airline pilot which allegedly discriminated against blacks. Quoting the *Spurlock* decision, the Seventh Circuit held that "when a job clearly requires a high degree of skill and the economic and human risk in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show his employment criteria are job-related."[30] Accordingly, the circuit court found that Greyhound need only "demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers."[31] Since the court was not sure that functional age as opposed to chronological age was "readily or practically determinable,"[32] and since it agreed with the company that the job of an intercity bus driver was physically and mentally demanding,[33] it concluded that Greyhound had established that its hiring policy "is founded upon good faith judgment concerning the safety needs of its passengers and others" and "is not the result of an arbitrary belief lacking in objective reason or rationale."[34]

There has been considerable criticism of the *Greyhound* decision.[35] It has been argued by at least one commentator that the court of appeals, despite its assertions to the contrary, applied the same legal test as the lower court and should not have reversed because the trial court's decision was not clearly erroneous.[36] Presuming the same test was applied by both appellate and trial courts, there was sufficient evidence to sustain the lower court's finding. However, the language of the opinion makes it clear that the Seventh Circuit placed a substantially lighter burden upon the defendant.[37]

In a parallel case, *Usery v. Tamiami Trail Tours, Inc.*,[38] the Fifth Circuit Court of Appeals decided the same issue, maximum hiring age

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[28] *Id.* at 863.

[29] 475 F.2d 216 (10th Cir. 1972).

[30] Hogdson v. Greyhound Lines, Inc., 499 F.2d 859, 862 (7th Cir. 1974).

[31] *Id.* at 863.

[32] *Id.* at 864.

[33] *Id.*

[34] *Id.* at 865.

[35] *See generally* Kavorski & Kavorski, *Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment*, 27 VAND. L. REV. 839, 897-901 (1974); Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748 (1975); 16 B.C. INDUS. & COM. L. REV. 688 (1975).

[36] *See* 16 B.C. INDUS & COM. L. REV. 688 (1975).

[37] *Compare* the district court's standard, "whether or not Greyhound has established a 'factual basis' for its belief that applicants between the ages of 40 and 65 would be unable to perform safely," 354 F. Supp. at 236, with that of the appellate court: "Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy *might jeopardize* the life of one more person than might otherwise occur under the present hiring practice." 499 F.2d at 863 (emphasis added).

[38] 531 F.2d 224 (5th Cir. 1976).

limitation as a BFOQ, and reached the same conclusion by a different rationale.[39] Fifth Circuit litigation in *Weeks v. Southern Bell Telephone Co.*[40] and *Diaz v. Pan American World Airlines, Inc.*,[41] relating to the BFOQ provisions under Title VII, had yielded a two-pronged test for determining the existence of such a qualification. The first prong of this test, under *Diaz*, required that the alleged BFOQ must be reasonably necessary to the essence of the business being conducted.[42] Secondly, under *Weeks* the employer had the burden of proving either that "he had reasonable cause to believe, that is a factual basis for believing, that all or substantially all of [the protected group] would be unable to perform safely and efficiently the duties of the job involved"[43] or that "it is impossible or highly impractical to deal with [the protected group] on an individualized basis."[44]

In *Usery*, the Florida district court applied the *Weeks* test to the facts presented.[45] It found that the "essence of the motor carriage of passengers is safety."[46] Further, "if the employment of drivers over age forty would undermine that safety, the maximum age standard utilized by defendant is 'reasonably necessary' within the meaning of the *bona fide* occupational qualification exception to the act."[47] Expert testimony proved to the court's satisfaction that "few men over forty have those physical and mental abilities possessed by most men under forty, which are fundamental to ensure a continuous and controlled safety factor in operations,"[48] and that "functional age, as distinguished from chronological age, of a driver applicant cannot be determined with sufficient reliability."[49] Thus, the defendant had proven that its policy was related to a business necessity, and that it was justified because all or substantially all male applicants over forty were unable to perform adequately and because there was no practical way to sort out individually the adequate from the inadequate. The Department of Labor appealed, and the Fifth Circuit Court of Appeals affirmed the lower court's decision.[50]

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[39] Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

[40] 408 F.2d 228 (5th Cir. 1969).

[41] 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950.

[42] Diaz v. Pan American World Airlines, Inc., 442 F.2d 385, 388 (5th Cir. 1971).

[43] Weeks v. Southern Bell Tel & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

[44] *Id.* at 235 n. 5.

[45] Not only were the issues involved in *Usery* the same as those in *Weeks*, but both cases involved intercity bus firms. The plaintiff and defendant in *Usery* also used the same expert witnesses. The National Association of Motorbus Carriers participated as amicus curiae, as it had in *Greyhound*, and representatives of Greyhound Lines, Inc. testified at trial on behalf of Tamiami Trail Tours, Inc. *Compare* Brief for Appellee at 10, 13, 14, 18, 19, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976), *with* Brief for Appellant at 9, 10, 13, 14, 17, 20, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974).

[46] Hogdson v. Tamiami Trail Tours, Inc., 4 Empl. Prac. Dec. 6047, 6050 (S.D. Fla. 1972).

[47] *Id.*

[48] *Id.* at 6052.

[49] *Id.* at 6051.

[50] Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

The Fifth Circuit's decision is also open to criticism. First, the court failed to demand the "factual basis" required under *Weeks*.[51] There was testimony from the employer's sole medical expert,[52] but the objective data upon which his opinion was based was nowhere evidenced.[53] Standing alone, this testimony offered little support for an exception to a Congressionally-mandated presumption. The Seventh Circuit apparently did not feel that the objective data required by *Weeks* could be met. For this reason, they were unwilling to use that formula when deciding *Greyhound*, and instead adopted a much weaker one of their own.

Secondly, it appears that the appellate court misunderstood the trial court's decision. The Fifth Circuit stated that at the trial the company had refrained from attempting to prove that all or substantially all males over forty were incapable, but had successfully proven the impracticality of attempting to screen out those applicants who were not acceptable.[54] In fact, the district court had found that both portions of the *Weeks* test had been proven.[55]

Upon examination of the *Weeks* test, it is clear that both portions of the test should be proven in order to justify an exemption. Only when substantially all of the suspect group can be proven to be incapable, *and* there is no practical way of sorting out the capable from the others, does it make sense to exclude the suspect group *as a group*. If substantially all are incapable, but there exists a practical way of differentiating between those capable and those incapable, it makes little sense to exclude the entire group. If, on the other hand, there is no way to make a determination among members of the affected group, but substantially all of the group are capable, it is arguable that the risk is probably no greater than for the rest of humanity. Indeed, the result of using the Fifth Circuit's rationale in *Tamiami* would be to disqualify all drivers regardless of their age, since the trial court found as fact that "functional age . . . cannot be determined with sufficient reliability."[56]

III. Added Confusion: The Eighth Circuit Strikes Off In The Opposite Direction?

Since *Greyhound* and *Tamiami*, the Eighth Circuit Court of Appeals held in *Houghton v. McDonnell-Douglas Corp.*[57] that the age of fifty-two did not qualify as a BFOQ defense for the occupation of test pilot. The district court had adopted the company's position that age is an appropriate BFOQ for production test pilots. The court found as fact that "portions of the [test] flight commonly occur in the vicinity of a major

[51] Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

[52] Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 237 (5th Cir. 1976).

[53] *Id.* at 237-38. *See also* Brief for Appellee at 36-37, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

[54] Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236, 238 (5th Cir. 1976).

[55] Hodgson v. Tamiami Trail Tours, Inc., 4 Empl. Prac. Dec. 6047, 6051 (S.D. Fla. 1972).

[56] *Id.* at 6051.

[57] 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3351 (1977).

city with the attendant danger to the general population in the event of an accident or crash."[58] In addition, it found that a "test pilot must perform his duties under conditions of psychological and physiological stress."[59]

Aging, the district court felt, results in a gradual deterioration of the bodily functions to such an extent that "in general those over the age of sixty can be said to have aged" and that "such age-related deteriorations are not always detected or even detectable."[60] In applying the test developed and used by the Fifth Circuit in *Tamiami*, the court concluded that since there was "no practical way to determine plaintiff Houghton's functional age, the Court is of the opinion that defendant McDonnell was clearly acting within its rights to use plaintiff Houghton's chronological age for determining whether or not the plaintiff would be a sufficiently safe test pilot."[61]

On appeal to the Eighth Circuit, Retired Supreme Court Justice Clark, sitting by designation, noted that "it was shown that medical technology can predict a disabling physical condition in a test pilot with fool proof accuracy."[62] Ironically, the *Greyhound-Tamiami* courts were uncertain as to the ability of medical technology to predict physical conditions in a bus driver. Justice Clark, quoting *Weeks*, noted that "to uphold the finding [sustaining age as a BFOQ defense] of the District Court in the face of this evidence would [allow] the exception [to] swallow the rule."[63] Justice Clark also noted that the district court had entered judgment for the company despite a "mountain of evidence against the company position."[64]

At first blush, one would think that the decision would be cause for celebration among the Grey Panthers, and if nothing else, would provide some degree of certainty in the law for employers. However, the decision can and probably will be interpreted narrowly. First, the case is not applicable to the *Greyhound-Tamiami* situation in which an employer has imposed an age limitation on new, inexperienced hires. Rather, *McDonnell-Douglas* dealt with the termination of an experienced employee simply because of age. Second, the *Greyhound* decisions placed emphasis on experience as a compensating factor for age-related disabilities. Likewise, Justice Clark found experience to be a remedial factor: "the major cause of accidents is poor pilot judgment, a factor which experience alone can remedy."[65] In this context, despite the contrary results, the rationale of the two courts is quite similar. Third, the decision involves professional pilots, a small and select group of

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[58] Houghton v. McDonnell-Douglas Corp., 413 F. Supp. 1233 (E.D. Mo. 1976), *rev'd*, 553 F.2d 561 (8th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3351 (1977).

[59] *Id.*

[60] *Id.* at 1236.

[61] *Id.* at 1238.

[62] Houghton v. McDonnell-Douglas Corp., 553 F.2d 561, 564 (8th Cir. 1977).

[63] *Id.*

[64] *Id.*

[65] *Id.* at 563-64.

Americans. There should not be great expectations, therefore, that the favorable treatment of the plaintiff in *McDonnell-Douglas* will be accorded to all of those in the protected age group, particularly since the Development of Labor's evidence showed that aging occurs more slowly and to a lesser degree among professional pilots than the general population.[66]

The fourth and final reason for caution is the fact that the opinion of Justice Clark, as originally written, contained some rather broad and expansive language which clearly would have made the case applicable on a broader scale. However, the amended opinion after the petition for rehearing *en banc* before the Eighth Circuit deleted some very instructive language. In the original circuit court opinion, for example, after noting "that medical technology can predict a disabling physical condition in a test pilot with virtually foolproof accuracy,"[67] Justice Clark went on to add that "it follows that the likelihood of disability simply by age is highly remote."[68] This latter deletion will give added weight to the argument that the decision should be narrowly construed.

Another Eight Circuit district court opinion also does not provide much solace for slightly older Americans, despite its favorable result. In *Aaron v. Davis*, two firefighters were terminated under a city statute requiring mandatory retirement at age sixty-two.[69] The city argued that age sixty-two qualified as a BFOQ for firefighters, since the work was arduous and the safety of the public and fellow firefighters was involved.[70]

In evaluating the city's BFOQ defense, the court employed the following test:

> where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition or stereotyping, *i.e.*, without *any* empirical justification.[71]

The city had offered no empirical justification for its retirement age. The court concluded that this failure on the part of the defendant was fatal to its BFOQ defense, and ordered reinstatement and back pay for both of the plaintiffs.

The court, in these authors' opinions, could not understand why the city could not continue to employ the two individuals for another three

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[66] *Id.* at 563.

[67] *Id.* at 564.

[68] Houghton v. McDonnell-Douglas Corp., No. 76-1652, slip op. at 6 (8th Cir., May 11, 1977) (Clark, J.).

[69] Aaron v. Davis, 414 F. Supp. 453 (E.D. Ark. 1976).

[70] *Id.* at 459, 461.

[71] *Id.* at 461 (emphasis added).

years until retired at age sixty-five like other city employees. The city's inability to produce any objective data to support its retirement policy probably made the statute appear more arbitrary and capricious than it might otherwise. The case is, therefore, only instructive as to a situation where an employer does nothing to justify the BFOQ.

IV. Sources and Reasons

To better understand recent BFOQ decisions, an analysis of the legislative history of ADEA is instructive. One is struck by the paucity of legislative explanation with regard to the BFOQ provision. In the Congressional hearings held prior to the passage of the bill, there was little mention or discussion of that portion of the ADEA. In the Senate hearings, BFOQ was twice discussed in reference to the training of older individuals when the training is expensive and mandatory retirement age at sixty-five is close at hand.[72] The House hearings are equally devoid of explanatory reference,[73] and the House Report on the bill simply restated the language of the Act. There was also an additional note to the effect that Congress did not intend the Act to overrule requirements imposed by regulatory agencies as to the physical qualifications of drivers in the trucking industry.[74]

It is worth noting in this context that subsequent to the passage of the ADEA, Congress passed the Railroad Safety Act[75] which, it can be argued, was the first recent opportunity Congress has had to examine the simultaneous impact of safety and age limitations. The House Report on that bill stated that "the phrase 'except such qualifications as are specifically related to safety' [should] not be construed to give the Secretary any authority to prescribe a regulation or standard which might disqualify an employee for safety reasons solely by reason of age."[76] To these authors' knowledge, this argument has not been made, as yet, before a court involved in a BFOQ determination.

Coupled with the lack of legislative history is the apparent existence of unstated assumptions regarding older persons within the judiciary

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[72] *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 48-49 (1967). Senator Yarborough, Chairman of the Subcommittee, commented that pilots of supersonic aircraft would be covered by the Act. *Id.* at 52 (statement of Senator Yarborough).

[73] The only noteworthy statement relative to this issue was made by Congressman Dent, Chairman of the Subcommittee, in which he said: "But I can't see the logic of assuming that a person over 40 or 45 or 50 is physically unfit without even taking the time to make an examination or give an examination to determine whether or not he can meet production figures." *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 72 (1967) (statement of Congressman Dent).

[74] H.R. Rep. No. 805, 90th Cong., 1st Sess., *reprinted in* [1967] U.S. Code Cong. & Ad. News 2213, 2220. The House Report also mentioned that in some industries such as railroads in which a disproportionately high number of older workers are employed, employers should not be prevented from achieving a reasonable age balance. *Id.* at 2219.

[75] 45 U.S.C. §§ 421, 431-441 (1970).

[76] H.R. Rep. No. 91-1194, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4104, 4115.

which are similar to those of society at large. Commentators have suggested that a common reason for not hiring older workers is the assumption of physical deterioration,[77] which supposedly makes them less able to meet the physical demands of their job.[78] Yet countless studies conducted to date indicate that age-based generalizations are without validity even in regard to reflexes and physical stamina.[79] However, such a bias would help explain the willingness of the Seventh Circuit to accept the generalized assertions made by Greyhound in defense of its age limitation, as well as some of the remarks made by the district court judge in *Tamiami*.[80]

V. CONCLUSION

A closer look at the history of that portion of the Fifth Circuit BFOQ test enunciated in *Weeks* reveals the careless method of its development. Part of the *Weeks* decision speaks to the impracticality of dealing with the protected group on an individualized basis. This statement was contained in footnote five of the opinion, and was made in reference to the district court decision in *Bowe v. Colgate-Palmolive Co.*[81] In the latter case, the lower court had found that since it was not pragmatically possible for the employer to assess the individual capabilities of each female applicant, the employer was not required to do so.[82] Subsequent to the *Weeks* decision, however, the Seventh Circuit reversed *Bowe* and required the company to allow each applicant, male or female, to be tested individually to determine adequacy.[83] Thus, footnote five appears to have been included so as to avoid a possible conflict with another circuit court — a conflict which never materialized.[84]

It is worth noting that the "all or substantially all" language of the

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[77] Kavorski & Kavorski, *supra* note 35, at 845.

[78] *See* Note, *Mandatory Retirement — A Vehicle for Age Discrimination*, 51 CHIC.-KENT L. REV. 116, 118 (1974); Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 158-59 (1971).

[79] *See* Note, *Mandatory Retirement — A Vehicle For Age Discrimination*, 51 CHIC.-KENT L. REV. 116, 119-20 (1974); Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. CAL. L. REV. 150, 159-61 (1971); Note, *The Constitutional Challenge to Mandatory Retirement Statutes*, 49 ST. JOHN'S L. REV. 748, 773-75 (1975); Note, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 S. CAL. L. REV. 1311, 1317 (1974). For a discussion of aging in relation to driving skills, *see* T. PLANCK, W. MANN, & E. WEINER, AGE AND HIGHWAY SAFETY: THE ELDERLY IN A MOBILE SOCIETY 3, 22-23, 32 (1975), and J. BOTWINICK, AGING AND BEHAVIOR 174 (1973).

[80] It was urged on behalf of the company in *Tamiami* that it is only "common sense to recognize that it is certainly more difficult for a 45-year-old man or a 50-year-old man to adjust to these [uncertain] working conditions [on extra-board] than it would be for someone younger." Brief for Appellant at 42, Usery v. Tamiami Trails Tours, Inc., 531 F.2d 224 (5th Cir. 1976).

[81] 272 F. Supp. 332 (S.D. Ind. 1967), *modified*, 416 F.2d 711 (7th Cir. 1969).

[82] *Id.* at 357.

[83] Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969).

[84] The *Weeks* court stated in footnote five that "[i]t may be that where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule." Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n. 5 (5th Cir. 1969).

main text of *Weeks* was formulated during a period when there was a degree of court hostility to the Title VII sex discrimination provisions.[85] Certainly, the *Weeks* language was not as expansive as that of other circuit courts which considered the BFOQ problem.[86]

The Department of Labor's failure to launch a case-in-chief has also contributed to the present BFOQ jumble.[87] This was understandable in view of prior case law which placed the burden upon the employer seeking the exception.[88] In addition, the Department failed to seek hearings from the Department of Transportation regarding an appropriate age limit for bus drivers, which undoubtedly disturbed the author of the Fifth Circuit decision.[89] Had the Department sought and obtained a favorable ruling from the Transportation Department, the courts might have been less reticent in enforcing the ADEA despite a safety issue. At the very least, it would have allowed the courts to avoid responsibility for the consequences of enforcing the Act's prohibition.

It should now be clear that the original formula devised in *Weeks* is inadequate to deal with such sensitive issues as safety and society's bias regarding age. As long as the current quagmire surrounding the interpretation of BFOQ continues, the Congressionally-mandated goal of promoting employment of older persons based on ability rather than age will remain unfulfilled.[90]

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[85] *See generally* Note, *Female Sex as a Bona Fide Occupational Qualification for Position of Airline Flight Cabin Attendant*, 17 WAYNE ST. L. REV. 242, 243-44 (1971); Note, *Sex-Plus: The Failure of the Attempt to Subvert the Sex Provision of the Civil Rights Act of 1964*, 7 GONZ. L. REV. 83 (1971); 6 SUFFOLK U. L. REV. 758 (1972).

[86] *See* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Rosenfield v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).

[87] *See* Brief for Appellant at 34-38, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1975); Brief for Appellee at 36-44, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974). The sum of these arguments was that once the Department had proven a prima facie case of discrimination, it was incumbent upon the defendent to go forward with the evidence. The Department contented itself with attempting to undermine the employer's evidence, rather than attempting to prove that many older workers were qualified.

[88] *See* cases cited in note 11 *supra*. *See also* A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1944); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 234 (5th Cir. 1969); Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454, 462 (D. N.J. 1970).

[89] *See* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 239 (5th Cir. 1976).

[90] On November 28, 1977, the Supreme Court denied certiorari in the *McDonnell-Douglas* case. In view of the possible narrow interpretation of the Eighth Circuit's opinion suggested earlier, the full import of this denial cannot be clearly determined, and resolution of the present BFOQ controversy must await more definitive treatment by the Supreme Court or by Congress.